UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANTHONY WALLER, Petitioner, v. KENNETH QUINN, Respondent.	CASE NO. C05-1904-MJP REPORT AND RECOMMENDATION

INTRODUCTION

Petitioner Anthony Waller is a Washington state prisoner who is currently serving a 432-month sentence for first degree murder. He has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, to which respondent has filed an answer. After considering the parties' briefs and the balance of the record, the court recommends that the petition be denied with prejudice.

BACKGROUND

The Washington Court of Appeals summarized the facts in petitioner's case as follows:

> On the evening of January 17, 1999, in Auburn, Washington, at about 10:30

p.m., the defendant Anthony Waller and three other young men, Michael Waller, Adam Okerson and Nick Kemper, left Michael's house in Kemper's Ford Bronco. After buying some beer, the four young men stopped in an industrial area near some warehouses. Anthony got out of the truck and, with a screwdriver, began breaking into vehicles and stealing things.

As the group was getting ready to leave, they spotted a man walking through the area some distance away. Anthony jumped out of the Bronco and started to chase the man. According to Okerson, Anthony said that he was worried about the guy getting the license plate number of the Bronco, and claimed that "he was going to go beat this guy's ass." Okerson observed Anthony hit the man in the back of the head with his fist and observed the man struggle to get away. Michael and Okerson then followed Anthony. They found him some distance away, kneeling over the man he had been chasing, and apparently punching him. The man was lying on his back and his face was covered with blood. Okerson and Michael called Anthony, who rose to return with them to the Bronco. At this point, Anthony said something like, "This is what happens . . . when people fuck with me or see shit they're not supposed to." Okerson saw that Anthony had a screwdriver in his hand.

When the three men returned to the Bronco, Kemper drove away from the scene. As the Bronco turned to enter Highway 167, Anthony threw the screwdriver out of the window.

The group returned to Michael's house. As they were entering the house, Anthony warned Michael and Okerson not to say anything about the assault to anyone. Anthony entered the house to wash his hands, and then left with Kemper.

Some hours later, a passerby discovered the victim's body. Police officers identified the man as Thomas Moore, a homeless man who lived in a camp nearby. The victim suffered more than 40 stab wounds to the head, and through-and-through stab wounds to the left hand. The wounds to the hand were defensive, indicating that Moore initially attempted to ward off the blows. The majority of the wounds were localized around the eyes. The wounds were all consistent with being inflicted with a flathead screwdriver.

In late February 1999, the police investigation ultimately led police to numerous witnesses, including Okerson, Kemper and Michael Waller. With the assistance of the witnesses, police located the screwdriver that Anthony had thrown from the window of the Bronco, near an on-ramp of Highway 167. Blood was present on the screwdriver. DNA tests revealed that the genetic profile of the blood was the same as the victim's.

Police removed small chips of freshly broken glass from the victim's overalls.

> Police also recovered glass fragments from the passenger side floor mat where Anthony Waller was sitting in the Bronco after the car prowls. Two of the glass samples from the floor mat had the same refractive index as samples recovered from the overalls. Anthony Waller had left town in late January, telling his fiancee that he had to leave because he had murdered somebody. Waller eventually surrendered to police in Honolulu, Hawaii on March 19, 1999.
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> Detectives Steven Kelly and Kathy Holt of the Kent Police Department flew to Hawaii and met with Waller on March 20, at around midnight. They advised Waller of his rights, and he indicated that he wanted to speak with the detectives, but wished to talk with his father first. The detectives returned the following day. Because Waller had not yet spoken to his father, the detectives allowed him to make that telephone call. After the call, Waller indicated that he was willing to talk with the detectives. The detectives again advised Waller of his rights, which he waived. Waller initially told the detectives, in a taped statement, that Michael Waller and Adam Okerson had attacked the victim, and that he had not participated in the attack. The detectives confronted Waller with the evidence they had so far obtained, and told him that they did not believe his story. Waller then started to cry and admitted to the killing. The detectives took a second tape-recorded statement from Waller, after again advising him of his rights and obtaining a waiver. Waller admitted that he was the sole attacker, but claimed that he was "really drunk" that night and had not meant to kill the man.
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> Waller was charged with premeditated murder in the first degree. Before trial, Waller filed a CrR 3.5 motion to suppress the statements that he had made to police. After a hearing, the trial court ruled that the statements were admissible.
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> On December 23, 1999, a jury found Waller guilty as charged. Waller's standard sentence range was 271 to 361 months. The trial court imposed an exceptional sentence of 432 months, finding that deliberate cruelty to the victim was an aggravating circumstance. The court also imposed a community placement sentence

State of Washington v. Waller, Unpublished opinion, 2001 WL 919349 (Wash. App. 2001) (Dkt. #18, Ex. 4 at 2-5).

Petitioner appealed to the Washington Court of Appeals. The court affirmed petitioner's conviction and sentence, but remanded for clarification of the community placement portion of the sentence, in an unpublished opinion. (Dkt #18, Ex. 4). Petitioner petitioned for review with the

Washington Supreme Court. (*Id.*, Ex. 5). The Washington Supreme Court denied review. (*Id.*, Ex. 6).

On November 14, 2003, petitioner filed a personal restraint petition ("PRP") in state court. The Washington Court of Appeals dismissed petitioner's PRP. The Washington Supreme Court granted review, but then dismissed the PRP. (*Id.*, Ex. 13).

On November 18, 2005, petitioner filed the instant petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Dkt. #4). After receiving an extension of time, petitioner filed a brief in support of the petition on February 22, 2006. (Dkt. #9). Respondent filed an answer, after receiving an extension of time to do so, along with the state court record, on June 22, 2006. (Dkt. #16). The Court directed respondent to supplement the record on August 1, 2006. (Dkt. #20). Respondent did so on August 10, 2006 (Dkt. #23), and the matter is now ready for review.

GROUNDS FOR RELIEF

Petitioner sets forth the following grounds for relief in his habeas petition[1]:

1. I was denied effective assistance of counsel. . . .

2. The trial court was not constitutionally authorized to determine facts that would increase my sentence beyond the prescribed statutory maximum. . .

3. The trial court erred in admitting my statements to the police. . . .

4. The trial court erred when engaging in unconstitutional side-bars. . . .

(Dkt. #4 at 5-6).

[1] The Court notes that these issues are presented in a different order in petitioner's brief in support of his habeas petition. (Dkt. #9). For the sake of simplicity, the Court will address the issues in the order in which they were presented in the petition.

DISCUSSION

Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is *contrary to*, or involved an *unreasonable application* of, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d) (emphasis added).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)

In *Lockyer v. Andrade,* 538 U.S. 63 (2003), the Supreme Court examined the meaning of the phrase "unreasonable application of law" and corrected an earlier interpretation by the Ninth Circuit which had equated the term with the phrase "clear error." The Court explained:

> These two standards, however, are not the same. *The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a "firm conviction" that the state court was "erroneous."* . . . [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively

unreasonable.

538 U.S. at 68-69 (emphasis added; citations omitted).

Thus, the Supreme Court has directed lower federal courts reviewing habeas petitions to be extremely deferential to decisions by state courts. A state court's decision may be overturned only if the application is "objectively unreasonable." 538 U.S. at 69.

Petitioner's First Ground for Relief: Ineffective Assistance of Counsel

In his first ground for relief, petitioner contends that "[t]here was substantial evidence in the record to show that I was heavily intoxicated. My attorney, however, failed to raise a diminished capacity defense which could have negated the premeditated element of my charged crime." (Dkt. #4 at 5).

Claims of ineffectiveness of counsel are reviewed according to the standard announced in *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). In order to prevail, petitioner must establish two elements: First, he must establish that counsel's performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness" under "prevailing professional norms." *Strickland*, 466 U.S. at 687-88 (1984). Second, he must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Regarding the first prong of the *Strickland* test, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* The test is not whether another lawyer, with the benefit of hindsight, would have acted

differently, but whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 689.

In addition, the Supreme Court has stated that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "The object of an ineffective assistance claim is not to grade counsel's performance. If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

Petitioner's argument fails for several reasons. First, under *Strickland*, a court reviewing a claim of ineffective assistance of counsel must be highly deferential to counsel's decisions regarding trial strategy. *See* 466 U.S. at 689. Petitioner's counsel's strategic decisions are therefore largely shielded from second-guessing, and to the extent that they can be second-guessed, petitioner has not shown that counsel's decision not to pursue a defense based upon diminished capacity fell outside "the wide range of reasonable professional assistance." *Id.* As the Washington Court of Appeals noted: "Although [petitioner] shared some beer with his friends before committing the crime, the record does not demonstrate that he was not in full control of his faculties. [Petitioner] has not proved that a reasonable defense attorney would have hired an expert to evaluate a diminished capacity defense." (Dkt. #18, Ex. 4 at 11-12).

In addition, petitioner fails to show any prejudice that resulted from not pursuing such a defense. Petitioner has not submitted any evidence showing existence of a "mental condition or disorder, and the required nexus between it and the alleged inability to form the requisite specific intent," that would have been required by the trial court to show "diminished capacity" under

Washington law. *State v. Stumpf*, Wash. App. 522, 526-27 (1992). Although portions of the trial transcript support petitioner's allegation that he was drinking beer on the night of the crime, mere intoxication does not appear to satisfy the requirements under Washington law of a diminished capacity defense. *See id.* Accordingly, the state court decision rejecting this claim is not objectively unreasonable, and petitioner's first claim that counsel was ineffective should be denied.

Petitioner's Second Ground for Relief: Challenge to Exceptional Sentence

In his second ground for relief, petitioner attempts to challenge the exceptional sentence imposed by the trial court, which was based upon the court's finding that petitioner had displayed "deliberate cruelty" by inflicting over 40 stab wounds with the screw driver to the victim's head and face. (Dkt. #18, Ex. 1, "Findings and Conclusions" at 2). Petitioner's challenge is based upon *Blakely v. Washington* , 124 S. Ct. 2531 (2004), which invalidated a portion of Washington's sentencing scheme as violative of the Sixth Amendment right to trial by jury. However, the Ninth Circuit has held that *Blakely* does not apply retroactively to cases on collateral review. *See Schardt v. Payne,* 414 F.3d 1025, 1036 (9th Cir. 2005). Therefore, petitioner may not challenge his conviction based upon an alleged *Blakely* violation, and this claim should be denied.

Petitioner's Third Ground for Relief: Statements to Police

In his third ground for relief, petitioner contends that the trial court violated his Fifth Amendment right against self-incrimination when it ruled that petitioner's statements to the police were admissible. Respondent counters that petitioner failed to properly exhaust this claim in state court and that the claim is barred from review here.

In order to present a claim to a federal court for review in a habeas corpus petition, a petitioner must first have presented that claim to the state court. *See* 28 U.S.C. § 2254(b)(1). The

exhaustion requirement has long been recognized as "one of the pillars of federal habeas corpus jurisprudence." *Calderon v. United States Dist. Ct. (Taylor)*, 134 F.3d 981, 984 (9th Cir.) (citations omitted), *cert. denied*, 525 U.S. 920 (1998). Underlying the exhaustion requirement is the principle that, as a matter of comity, state courts must be afforded "the first opportunity to remedy a constitutional violation." *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981).

In addition, a petitioner must not only present the state court with the *first* opportunity to remedy a constitutional violation, but a petitioner must also afford the state courts a *fair* opportunity. *Picard v. Connor*, 404 U.S. 270 (1971); *Anderson v. Harless*, 459 U.S. 4 (1982). It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. *Harless*, 459 U.S. at 6. "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

Finally, a petitioner must raise in the state court all claims that can be raised there, even if the state court's review of such claims is purely discretionary. *See O'Sullivan v. Boerkel*, 526 U.S. 838, 841-47 (1999). In other words, a petitioner must invoke one complete round of a state's established appellate review process, including discretionary review in a state court of last resort, before presenting their claims to a federal court in a habeas petition. *Id.* at 842-44. Thus, in Washington state, a petitioner must seek discretionary review of a claim by the Washington Supreme Court in order to properly exhaust the claim and later present it in federal court for habeas review.

After reviewing the state court record, the court finds that petitioner's Fifth Amendment

claim was not presented as a federal issue to the Washington Court of Appeals on direct review, nor was the issue presented at all to the Washington Supreme Court. (Dkt. #18, Exs. 5, 7, 9). Accordingly, petitioner failed to properly exhaust this issue. In addition, because more than one year has passed since his conviction became final, petitioner is now procedurally barred from raising this claim in state court. *See* RCW 10.73.090.

When, as here, a petitioner has procedurally defaulted on a claim in state court, the petitioner "may excuse the default and obtain federal review of his constitutional claims only by showing cause and prejudice, or by demonstrating that the failure to consider the claims will result in a 'fundamental miscarriage of justice.'" *See Noltie v. Peterson,* 9 F.3d 802, 806 (9th Cir. 1993) (citing *Coleman v. Thompson,* 501 U.S. 722 (1991)). Petitioner has failed to show that "cause and prejudice" exist excusing his default on the unexhausted claim. Nor has he shown that failure to consider the claims will result in a miscarriage of justice. Accordingly, petitioner's third ground for relief is barred from federal habeas review and should be denied.

Petitioner's Fourth Ground for Relief: Use of Side Bar Discussions

In his final ground for relief, petitioner maintains that his right to a fair appeal was compromised by the fact that the record on appeal did not include transcripts of the side-bar discussions held between the trial court and the attorneys. This claim may be summarily denied, however, because petitioner fails to show, or even argue, that he suffered any prejudice by the omission in the record of the side-bar discussions. Therefore, the state court decision rejecting this claim is not objectively unreasonable, and petitioner's final ground for relief should be denied.[2]

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[2] In his pro se supplemental brief filed in state court, petitioner argued that he suffered prejudice from the lack of a record of the side-bar discussions because "there was a conspiracy to

CONCLUSION

For the foregoing reasons, petitioner's petition for a writ of habeas corpus should be denied with prejudice. A proposed Order reflecting this recommendation is attached.

DATED this 6th day of October, 2006.

Mary Alice Theiler
United States Magistrate Judge

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throw the case to the prosecution, and anytime [sic] the defense got dangerously close to developing an issue that may have favored the defense, a side-bar was called, to get their signals and tatics [sic] straight." (Dkt. #18, Ex. 3 at 19). However, petitioner does not support this allegation with any evidence, nor does he explain how he knows that the side-bar discussions were used for this improper purpose.